

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5308 OF 2007

Mrs.Charu Kishor Mehta Petitioner
V/s
Lilavati Kirtilal Mehta Medical Trust & Ors.....Respondents.

Mr.T.N.Subramaniam i/by M/s.T.N.Tripathi & Co. for the petitioner.

Mr.Rafiq Dada, Sr. Counsel i/by M/s.Nankani Associates for respondent NO.1.

Mr.P.K.Samdani, Sr. Counsel i/by M.g.Gowde, Adv. For respondent No.10.

Mr.M.S.Doctor with Mr.N.R.Dhilla with Ms.A.S.Bhansali i/by M/s.Hariani & Co., Adv. For respondent Nos. 11 to 13.

CORAM: A.P.DESHPANDE, J.
22/8/07

PC:

An order passed by the City Civil Judge is challenged in the present writ petition. The plaintiff with a view to examine two witnesses in support of her case served copies of un-sworn affidavit on the contesting defendants well in advance. Learned counsel appearing for the petitioner before the trial Court assured the Court that the sworn affidavit of examination in chief will not deviate from the un-sworn affidavit however the sworn affidavits in examination in chief goes to add and alter the text of the unsworn affidavit. Hence the contesting defendants raised objection and contended that the unsworn affidavit be treated as examination in chief. A further prayer was made to reject the sworn affidavit of examination in chief so also additional affidavit of examination in chief placed on record of the trial Court. By the

impugned order the Court below has accepted the submission made on behalf of the contesting defendants and directed the unsworn affidavit to be treated as examination in chief of witnesses. The Court has also rejected the sworn affidavit and the additional affidavit of examination in chief of witnesses and hence this petition. The learned senior counsel Shri Rafiq Dada has placed on record pursis stating that without prejudice to the contentions of the contesting defendants the affidavit of examination in chief dated 4.6.07 and additional affidavit dated 26.6.07 of witness Sadanand Gavali and affidavit of examination in chief dated 26.6.07 of another witness Mr.Govind Patel be permitted to be taken on record and marked exhibit for being treated as examination in chief with liberty to the contesting defendants to cross examine the witnesses touching the contents of the above referred affidavits and additional affidavit. It is further stated that the question of relevancy and admissibility of the contents of the aforesaid affidavits can be considered by City Civil Court at the time of final decision of the suit.

2. The pursis filed on record by the learned senior counsel goes to achieve the purpose sought to be achieved by the order passed by the Supreme Court dated 9.7.07 disposing of Civil Application No.2917/07 arising out of Special Leave Petition (Civil) No.10954/07. It is thus clear that on consideration of the affidavits of examination in chief and the additional affidavit of examination in chief the entire evidence can be brought on record by permitting cross examination of said witnesses touching the said affidavits as well so that at the appropriate stage evidence can be scanned, relevant and admissible evidence retained on record whereas inadmissible evidence can be rejected. The perusal of the impugned order further reveals that the trial Court has departed from the course it had adopted while dealing with evidence of the plaintiff. The trial Court has taken on record the unsworn affidavit of examination

in chief of the plaintiff. However rightly the sworn affidavit has been treated as examination in chief. So far as the witnesses are concerned by the impugned order the trial Court has directed the unsworn affidavit to be taken on record as examination in chief by proceeding to reject the sworn affidavit and additional affidavit. I do not propose to decide the issues involved in this petition touching the question as to what should constitute the examination in chief. Having regard to the pursis filed by the learned senior counsel for the contesting defendants I quash and set aside the impugned order and direct the trial Court to take on record the unsworn affidavit, the sworn affidavit and the additional affidavit tendered in examination in chief. The trial Court shall exhibit affidavit and additional affidavit. The contesting defendants shall be permitted to cross examine witnesses touching unsworn affidavit of examination in chief, sworn affidavit of examination in chief and additional affidavit of examination in chief. The evidence so brought on record can be appropriately examined at the time of final decision of the suit. Such of the evidence which is found to be either irrelevant or inadmissible can be rejected at that stage and the evidence that is found to be relevant and admissible can be considered. This is what the Supreme Court expected to be done by its order dated 9.7.07 and the observations to be precise made in para 12 of the order. I make it clear that all contentions of respective parties are left open to be addressed before the trial Court and the trial Court shall after hearing the submissions of the respective parties dispose of all the objections while delivering final judgment in the matter. Writ petition stands disposed of in above terms.

22.8.07